250.

SUPREME COURT OF THE UNITED STATES.

No. 89.

THE STATE MUTUAL FIRE INSURANCE COMPANY, PLAINTIFFS IN ERROR,

v.

DANIEL F. CONNELL & JOHN A. CARTER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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Among the rolls, records, and judicial proceedings of the Circuit Court of the United States, for the Western District of Pennsylvania, in the Third Circuit, may be found the following words and figures, viz.:

DANIEL F. CONNELL and JOHN A. CARTER, citizens of the State of Virginia,
v.
THE STATE MUTUAL FIRE INSURANCE CO., a corporation of the State of Penn'a.

Summons. Case. Issued June 1st, 1854.

Be it remembered, that heretofore, to wit, on the first day of June, in the year of our Lord one thousand eight hundred and fifty-four, comes the plaintiffs by their counsel, George S. Selden, Esq., and files the following precipe.

Copy of Precipe.

DANIEL F. CONNELL and JOHN A. CARTER, citizens of the State of Virginia,
v.
THE STATE MUTUAL FIRE INSURANCE CO., a corporation of the State of Penn'a.

Issue. Summons. Case. Returnable to the first Monday of June next.

GEO. S. SELDEN,
Plff's Att'y, P. g., May 2, 1854.

To H. SPROUL,
Clerk C't C't.

Plaintiff claims three thousand five hundred dollars with interest, from 2d November, A. D., 1853.

Upon which the following summons was issued:

Copy of Summons.

United States, Western District of Pennsylvania, *sct.*

[SEAL.] The President of the United States, to the Marshal of the Western District of Pennsylvania: Greeting.

We command you, that you summon the State Mutual Fire Insurance Company, a corporation of the State of Pennsylvania, late of your district, if they may be found therein, so that they be and appear before the Judges of the Circuit Court of the United States, in and for the Western District of Pennsylvania, in the Third Circuit, at a session of the same Court, to be holden at Pittsburgh, on the first Monday of June, inst. (1854), to answer to Daniel F. Connell and John A. Carter, citizens of the State of Virginia, in an action on the case. And have you then there this writ.

Witness, The Honorable Roger B. Taney, Esquire, Chief Justice of the Supreme Court of the United States, at Pittsburgh, this first day of June, A. D. 1854, and in the 78th year of the Independence of the said United States.

H. SPROUL,
Clerk.

Endorsement on the Summons.

Served the within writ, personally, by copy, on S. S. Carrier, one of the agents of the State Mutual Fire Insurance Co., June 2d, 1854.

WESTLEY FROST,
Marshal.

By I. G. SPROUL,
Dep. Marshal.

The following is a copy of the instrument of writing and narr, filed with the precipe in this case.

Copy of Policy of Insurance.

No. 12912. Merchants' class. $3500.

State Mutual Fire Insurance Company, Harrisburgh, Pa. By this Policy of Insurance, the State Mutual Fire Insurance Company, in consideration of twenty-six $\frac{2}{100}$ dollars in hand paid, and hereby acknowledged, do insure D. F. Connell and John A. Carter, of Wellsville, in the County of Columbiana, and State of Ohio, against loss or damage by fire, to the amount of thirty-five hundred dollars, on the following property, as described in application and survey, No. 12912, which is hereby declared to be part of this policy, viz.: On their three storied brick building, occupied for offices and stores, situated on corner of Lisbon and Water Street, Borough of Wellsville, Ohio, $2500; on their brick dwelling-house, situated near the above, $1000. And the said Company do hereby promise and agree to make good unto the said insured, their executors, administrators, and assigns, all such immediate loss or damage not exceeding three-fourths the appraised value of any building above the foundation or personal property destroyed or damaged, as shall happen by fire to the property above specified, from the twenty-ninth day of December, one thousand eight hundred and fifty-two (at 12 o'clock at noon), unto the twenty-ninth day of December, one thousand eight hundred and fifty-three (at 12 o'clock at noon), the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen, and to be paid within four months after notice and proof, and adjustment thereof, in conformity to the conditions annexed to this policy, unless the said Insurance Company shall, within thirty days after the proof of such loss or damages,

give direction for rebuilding and putting said property in as good a state of repair, or restoring the same as before injured by the fire. And in case any difference shall arise, touching such loss or damage, or the relative condition or value of said property when rebuilt or repaired; and if the Company or their agent require it, it shall be submitted to the judgment of arbitrators, chosen in accordance with the 11th Article of conditions annexed to this policy, whose award in writing shall be binding on both parties, provided always, and it is hereby declared, that this Company shall not be liable, or make good any loss by theft or property stolen, nor for any loss or damage caused by the bursting or explosion of any steam boiler or flues of any steam engine, nor for any loss or damage caused by the bursting or explosion arising from any other cause, or any loss or damage by fire which may happen, or take place by means of an invasion, insurrection, riot, or civil commotion; or of any military or usurped power; or by any earthquake or hurricane. And provided further, that in case the assured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this Company, and mentioned in, or endorsed upon this policy, then this insurance shall be void, and of no effect; and the assured hereby covenants and engages that the representation given in the application for this insurance is a warrantee on the part of the insured, and contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the risk of the property insured, so far as the same are known to the assured, and are material to the risk, and that if any material fact or circumstances shall not have been fairly represented, or if the said assured or their assigns shall hereafter make any other insurance on the same property, and shall not give immediate notice thereof to the secretary, and have the same endorsed on this instrument, or otherwise acknowledged by him in writing, then this policy shall cease, and be of no effect. The interest of the assured in this policy, or in the property insured thereby, is not assignable unless by consent of the Company manifested in writing, and in case of any transfer or termination of such interest, or any part, either by sale or otherwise, either prior or subsequent to any loss or damage without such consent, this policy shall henceforth be void, and of no effect, and in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or recover of this Company any greater portion of the loss or damages sustained than the amount hereby insured shall bear to the whole amount insured on the said property, and whenever this Company shall pay any loss, the assured agrees to assign over all his right to recover satisfaction therefor, from any other person, or persons, firm, or other corporations, or to prosecute therefor, at the charge, and for account of the Company, if requested. Camphine spirit gas, or burning fluid, when used in stores or warehouses, as a

light, subjects the goods therein to an additional charge, and permission for such uses, must be endorsed in writing on the policy. Gunpowder is expressly prohibited from being deposited, stored, or kept in any building insured, containing any goods or merchandise insured by this policy, unless by special consent in writing on the policy. And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above-mentioned building shall, at any time after the making, and during the continuance of this insurance, be appropriated, applied, or used to or for the purpose of carrying on, or exercising therein, any trade, business, or vocation, which would, in any way, increase the risk as described in the application and survey, or for the purpose of storing, keeping, or vending therein, any articles, goods, merchandize, denominated hazardous or extra hazardous, unless herein otherwise specially provided for, or hereafter agreed to by this Company in writing, and added to or endorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied or used, these presents shall cease, and be of no force or effect. And it is, moreover, declared, that this insurance is not intended to apply to, or to cover any books of account, written securities, deeds, or other evidences of titles to lands, nor to bonds, bills, notes, or other evidences of debts, nor to money or bullion, jewelry, musical instruments, or spirituous liquors. And that this policy is made and accepted in reference to the written application. Also to the conditions hereto annexed, which is hereby made a part of this policy, and to be used and resorted to, in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for. In witness whereof, the President of the said State Mutual Fire Insurance Company, hath hereunto subscribed his name, and caused the same to be attested by their Secretary, in Harrisburg, Penna., the 29th day of December, one thousand eight hundred and fifty-two.

J. P. RUTHERFORD,
President.

A. J. GILLETT,
Secretary.

A. A. CARRIER,
Agent.

And now, to wit, June 1st, 1854, comes the plaintiffs, by their counsel, and files the following declaration:

Copy of Declaration.

United States of America, Western District of Pennsylvania, *ss.*

In the Circuit Court of the United States, for the Western District of Pennsylvania.

give direction for rebuilding and putting said property in as good a state of repair, or restoring the same as before injured by the fire. And in case any difference shall arise, touching such loss or damage, or the relative condition or value of said property when rebuilt or repaired; and if the Company or their agent require it, it shall be submitted to the judgment of arbitrators, chosen in accordance with the 11th Article of conditions annexed to this policy, whose award in writing shall be binding on both parties, provided always, and it is hereby declared, that this Company shall not be liable, or make good any loss by theft or property stolen, nor for any loss or damage caused by the bursting or explosion of any steam boiler or flues of any steam engine, nor for any loss or damage caused by the bursting or explosion arising from any other cause, or any loss or damage by fire which may happen, or take place by means of an invasion, insurrection, riot, or civil commotion; or of any military or usurped power; or by any earthquake or hurricane. And provided further, that in case the assured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this Company, and mentioned in, or endorsed upon this policy, then this insurance shall be void, and of no effect; and the assured hereby covenants and engages that the representation given in the application for this insurance is a warrantee on the part of the insured, and contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the risk of the property insured, so far as the same are known to the assured, and are material to the risk, and that if any material fact or circumstances shall not have been fairly represented, or if the said assured or their assigns shall hereafter make any other insurance on the same property, and shall not give immediate notice thereof to the secretary, and have the same endorsed on this instrument, or otherwise acknowledged by him in writing, then this policy shall cease, and be of no effect. The interest of the assured in this policy, or in the property insured thereby, is not assignable unless by consent of the Company manifested in writing, and in case of any transfer or termination of such interest, or any part, either by sale or otherwise, either prior or subsequent to any loss or damage without such consent, this policy shall henceforth be void, and of no effect, and in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or recover of this Company any greater portion of the loss or damages sustained than the amount hereby insured shall bear to the whole amount insured on the said property, and whenever this Company shall pay any loss, the assured agrees to assign over all his right to recover satisfaction therefor, from any other person, or persons, firm, or other corporations, or to prosecute therefor, at the charge, and for account of the Company, if requested. Camphine spirit gas, or burning fluid, when used in stores or warehouses, as a

light, subjects the goods therein to an additional charge, and permission for such uses, must be endorsed in writing on the policy. Gunpowder is expressly prohibited from being deposited, stored, or kept in any building insured, containing any goods or merchandise insured by this policy, unless by special consent in writing on the policy. And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above-mentioned building shall, at any time after the making, and during the continuance of this insurance, be appropriated, applied, or used to or for the purpose of carrying on, or exercising therein, any trade, business, or vocation, which would, in any way, increase the risk as described in the application and survey, or for the purpose of storing, keeping, or vending therein, any articles, goods, merchandize, denominated hazardous or extra hazardous, unless herein otherwise specially provided for, or hereafter agreed to by this Company in writing, and added to or endorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied or used, these presents shall cease, and be of no force or effect. And it is, moreover, declared, that this insurance is not intended to apply to, or to cover any books of account, written securities, deeds, or other evidences of titles to lands, nor to bonds, bills, notes, or other evidences of debts, nor to money or bullion, jewelry, musical instruments, or spirituous liquors. And that this policy is made and accepted in reference to the written application. Also to the conditions hereto annexed, which is hereby made a part of this policy, and to be used and resorted to, in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for. In witness whereof, the President of the said State Mutual Fire Insurance Company, hath hereunto subscribed his name, and caused the same to be attested by their Secretary, in Harrisburg, Penna., the 29th day of December, one thousand eight hundred and fifty-two.

J. P. RUTHERFORD,
President.

A. J. GILLETT,
Secretary.

A. A. CARRIER,
Agent.

And now, to wit, June 1st, 1854, comes the plaintiffs, by their counsel, and files the following declaration:

Copy of Declaration.

United States of America, Western District of Pennsylvania, *ss.*

In the Circuit Court of the United States, for the Western District of Pennsylvania.

No. Term, 1854.

State Mutual Fire Insurance Company, Harrisburg, Pennsylvania, a corporation of, and within the State of Pennsylvania, was summoned to answer Daniel F. Connell and John A. Carter, citizens of the State of Ohio, of a plea of trespass on the case. Whereupon the said plaintiffs, by Geo. S. Selden, their attorney, complain for that whereas, the said defendants, on the 29th day of December, A.D. 1852, at Pittsburgh, to wit, at the District aforesaid, made their certain policy of insurance, by which said policy of insurance, the said defendant, in consideration of twenty-six $\frac{25}{100}$ dollars in hand paid, and thereby acknowledged, did insure the said plaintiffs against loss or damage by fire to the amount of thirty-five hundred dollars, on property as they described in said policy of insurance, viz.: On the said plaintiffs' three storied brick building, occupied for offices and stores, situated on corner of Lisbon and Water Streets, Borough of Wellsville, Ohio, twenty-five hundred dollars. On their brick dwelling-house situated near above, one thousand dollars. And the said Company did promise and agree to make good unto the said plaintiffs, all such immediate loss or damage, &c., as should happen by fire to said property, so as aforesaid described, from the twenty-ninth day of December, one thousand eight hundred and fifty-two, unto the twenty-ninth day of December, one thousand eight hundred and fifty-three, at 12 o'clock at noon; as in and by said policy here brought into Court by the said plaintiffs, fully sets forth, and will more fully and at large appear. And the said plaintiffs further say, that the said defendants then and there became and was an insurer to the said plaintiffs upon the said premises in the said policy in that behalf mentioned, to wit, at the district aforesaid. And that afterwards, on the day of A.D. one thousand eight hundred and fifty-three, and during and within the time in the said policy insured, the said premises, in the said policy mentioned and described, were entirely lost and destroyed by fire, of all which said several premises the said defendant afterwards, to wit, on the day and year last aforesaid, at the Western District of Pennsylvania aforesaid, had notice, and was then and there requested by the said plaintiffs to pay them the said sum of thirty-five hundred dollars, so by them insured as aforesaid, and which said sum of thirty-five hundred dollars, the said defendant then and there ought to have paid, according to the form and effect of the said policy of insurance, and its said promise and undertaking so made, as aforesaid, to wit, at the Western District of Pennsylvania, as aforesaid.

And, whereas, the defendants afterwards, to wit, the day and year aforesaid, in consideration of the premises, then and there promised to pay the said several sums of money respectively, on request to the said plaintiffs. Yet the said defendant has disregarded its promises, and has not paid any of the said sums of money or any part

thereof, to the plaintiffs' damage seven thousand dollars, and therefore they bring suit.

GEO. S. SELDEN,
Atty for Pl'ts.

And the said plaintiffs aver and say, that they have complied with all the terms and conditions of the said policy above declared upon, a copy of which is hereto attached, necessary by them to be performed and complied with, to entitle them to recover under the same.

Endorsement on Declaration: Narr, amended and copy of Policy added, and replication filed this 22d March, 1854, by consent nunc pro tunc as of June 1, 1854; Signed, A. W. Loomis, Def'ts Att'y; Geo. S. Selden, Pl'ff Att'y.

Merchants' Class; State Mutual Fire Insurance Company. Harrisburg, Pa.

By this Policy of Insurance, the State Mutual Fire Insurance Company, in consideration of twenty-six $\frac{25}{100}$ dollars in hand paid and hereby acknowledged, do insure D. F. Connell and John A. Carter, of Wellsville, in the County of Columbiana, and State of Ohio, against loss or damage by fire, to the amount of thirty-five hundred dollars, on the following property, as described in Application and Survey, No. 12,913, which is hereby declared to be part of this policy, viz.: On their three storied brick building, occupied for offices and stores, situated on corner of Lisbon and Water St., Borough of Wellsville, Ohio, $2500. On their brick dwelling-house situated near the above, $1000.

Copy.

And the said Company do hereby promise and agree, to make good unto the said assured, their executors, administrators, and assigns, all such immediate loss or damage, not exceeding three-fourths the appraised value of any building above the foundation, or personal property destroyed or damaged, as shall happen by fire to the property as above specified, from the twenty-ninth day of December, one thousand eight hundred and fifty (at 12 o'clock at noon), unto the twenty-ninth day of December, one thousand eight hundred and fifty-three (at 12 o'clock at noon); the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen, and to be paid within four months after notice, proof and adjustment thereof, in conformity to the conditions annexed to this Policy, unless the said Insurance Company shall, within thirty days after the proof of such loss or damages, give directions for rebuilding and putting said property in as good a state of repair, or restoring the same, as before injured by the fire. And in case any difference shall arise

touching such loss or damage, or the relative condition or value of said property, when rebuilt or repaired; and if the Company or their agent require it, it shall be submitted to the judgment of arbitrators, chosen in accordance with the 11th Article of Conditions annexed to this Policy, whose award in writing shall be binding on both parties. Provided, always, and it is hereby declared, that this Company shall not be liable to make good any loss by theft, or property stolen; nor for any loss or damage caused by the bursting or explosion of any steam boiler, or flues of any steam engine; nor for any loss or damage caused by the bursting or explosion arising from any other cause, or any loss or damage by fire, which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or by any earthquake or hurricane. And provided further, that in case the assured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this Company, and mentioned in or endorsed upon this Policy, then this insurance shall be void and of no effect; and the assured hereby covenants and engages that the representation given in the application for this insurance, is a warrantee on the part of the insured, and contains a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the risk of the property insured, so far as the same are known to the assured, and are material to the risk; and that if any material fact or circumstance shall not have been fairly represented; or if the said assured, or their assigns, shall hereafter make any other insurance on the same property, and shall not give immediate notice thereof to the Secretary, and have the same endorsed on this instrument, or otherwise acknowledged by him in writing, then this Policy shall cease and be of no effect. The interest of the assured in this Policy, or in the property insured thereby, is not assignable, unless by consent of the Company, manifested in writing, and in case of any transfer or termination of such interest, or any part thereof, either by sale or otherwise, whether prior or subsequent to any loss or damage, without such consent, this Policy shall henceforth be void and of no effect. And in case of any other insurance upon the property hereby insured whether prior or subsequent to the date of this Policy, the assured shall not, in case of loss or damage, be entitled to demand or recover of this Company, any greater portion of the loss or damages sustained, than the amount hereby insured, shall bear to the whole amount insured on the said property; and whenever this Company shall pay any loss, the assured agrees to assign over all his right, to recover satisfaction therefor, from any other person or persons, town or other corporation, or to prosecute therefor at the charge and for account of the Company if requested. Camphene, spirit gas, or "burning fluid," when used in stores or warehouses as a light, subjects the goods therein to an additional charge; and permission for such use must

be indorsed in writing on the policy. Gunpowder is expressly prohibited from being deposited, stored or kept in any building insured, containing any goods or merchandize insured by this policy, unless by special consent in writing on the policy. And it is agreed and declared, to be the true intent and meaning of the parties hereto, that in case the above mentioned building shall, at any time after the making, and during the continuance of this insurance, be appropriated, applied or used, to or for the purpose of carrying on, or exercising therein any trade, business, or vocation, which would in any way increase the risk (as described in the application and survey), or for the purpose of storing, keeping, or vending therein any articles, goods, or merchandize denominated hazardous or extra hazardous, unless herein otherwise specially provided for, or hereafter agreed to by this Company in writing, and added to or indorsed upon this Policy, then and from thenceforth, so long as the same shall be so appropriated, applied or used, these presents shall cease, and be of no force or effect. And it is moreover declared, that this insurance is not intended to apply to, or to cover any books of account, written securities, deeds, or other evidences of titles to lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion, jewelry, musical instruments, or spirituous liquors. And that this Policy is made and accepted in reference to the written application; also to the conditions hereto annexed, which is hereby made a part of this Policy, and to be used and resorted to, in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for.

In witness whereof, the President of the said State Mutual Fire Insurance Company, hath hereunto subscribed his name and caused the same to be attested by their Secretary, in Harrisburg, Penn., the 29th day of December, one thousand eight hundred and fifty-two.

State Mutual Fire Insurance Company, corner of Fourth and Market Streets, Harrisburg, Pa.

Officers: A. J. Gillett, Secretary; J. P. Rutherford, President. Directors: John P. Rutherford, Dauphin County; Philo C. Sedgwick, Harrisburg; Albert J. Gillett, Harrisburg; John B. Packer, Sunbury; Samuel T. Jones, Harrisburg; Robert Klotz, Mauch Chunk; Alonzo A. Carrier, Pittsburg; John B. Rutherford, Dauphin County; Samuel Jones, Philadelphia.

Directions for making an assignment and conditions of insurance, referred to in the foregoing policy.

☞In all cases where the Policy is to be assigned, the assigner must sign the assignment made out on the back of the Policy, and send to the Secretary, or a true copy thereof (with fifty cents recording fees), to be approved by a Director, and recorded on the Policy; also, on the book of the Company.

☞All communications should be directed to the Secretary (post paid), and if in reference to the Policy, the number must be given.

1. Applications for insurance on property must be in writing, and specify the construction and material of the buildings to be insured, or containing the property to be insured; by whom occupied, whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings and their construction or materials; whether any manufacturing is carried on within or about it; and in case of goods or merchandize, whether or not they are of the description denominated hazardous or extra hazardous, and such description or specification shall be signed by the applicant, and it shall be deemed a part of the Policy, and a warranty on the part of the insured.

If any person, insuring any building or goods in this Company, shall make any misrepresentations or concealment; or if, after the insurance is effected either by an original policy, or by the renewal thereof, the risk shall be increased by any means whatsoever within the control of the insured; or if such buildings or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect.

If, during the insurance, the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises or otherwise; or if, for any other cause, the Company shall so elect, it shall be optional with the Company to terminate the insurance, after notice given to the insured, or his representative, of their intention to do so; in which case the Company shall refund a ratable proportion of the premium.

2. Property held in trust, or on commission, must be insured as such; otherwise the Policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Goods on storage must be separately and specifically insured. If the interest in the property to be insured be a leasehold or other interest, not absolute, it must be so stated in the policy, otherwise the Policy shall be void.

3. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium, or if the premium named in this policy or any obligation which may be given for such insurance, or any part of it, remains unpaid or the conditions of such obligation are not fully complied with, this Policy shall be void and of no effect.

4. The interest of the insured in this Policy is assignable, provided the assent of this Corporation be first obtained to the transfer; notice of such assignment shall be given before any loss may have happened, and this Company, when so notified, may elect either to continue the insurance, and express the same by endorsement on this

Policy or refund a ratable portion of the premium, for the time of the risk unexpired, and cancel the Policy. In case of assignment without such consent, whether of the whole Policy or of any interest in it, or of any claims against said Company by virtue thereof, either prior or subsequent to loss or damage of the property or premises insured thereby, the liability of this Company, in virtue of such Policy, shall thenceforth cease.

The insurance by this Policy shall cease from the time that the property hereby insured shall be levied on or taken into possession or custody under an execution or other proceeding at law or equity.

Or if the property herein insured or any part of it shall be transferred by any contract or any change of partnership or ownership, then this Policy shall be void, unless the consent of the Secretary thereto be endorsed on this Policy.

5. Notice of all previous insurance upon property insured by this Company, shall be given to the Secretary, and endorsed on this Policy, or otherwise acknowledged by him in writing; otherwise the Policy subscribed by this Company shall be of no effect. And in case of subsequent insurance on property insured by this Company, notice thereof must be immediately given to the Secretary, to the end that such subsequent insurance may be endorsed on the Policy subscribed by this Company, or otherwise acknowledged in writing; in default whereof, such Policy shall thenceforth cease and be of no effect. And in all cases of insurance, this Company shall be liable for such ratable proportion of the loss or damage happening to the subject insured, as the amount insured by this Company shall bear to the whole amount insured thereon, without reference to the dates of the different Policies, subject to the above conditions.

6. In case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property. And if they fail to do so, this Company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect. And it is mutually understood and agreed that there can be no abandonment to the insurers of the subject insured; and also that this Company or their Agent have the right to examine and take account of the property saved, and that every facility be given to enable them to do so.

7. This Company will be liable for losses on property burnt by lightning; but not for any loss or damage to property injured or destroyed by lightning in any other way; nor for any loss or damage by fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, nor for any loss or damage caused by the bursting or explosion of any steam boiler or flues of any steam-engine; nor for any loss or damage caused by the bursting or explosion arising from any other cause; nor for any loss or claim for stolen goods, or for any other property

that may be stolen, unless specially specified on this Policy; or if the loss shall happen through the gross, wanton, or wilful misconduct of the insured, or through his gross or culpable negligence, or by means of his intoxication.

If no notice of a loss is given within thirty days from the time when it happened, it shall be discretionary with the Directors to reject or allow the claim of any part thereof.

No repairs or alterations in the premises shall be made after a fire, until notice is given to the Company, and they have had an opportunity to view and examine.

8. Books of accounts, written securities or other evidences of debt, title deeds, writings, money or bullion, are not deemed subjects of insurance.

9. Jewelry, plate, plated-ware, medals, paintings, statuary, spirituous liquors, sculptures, musical instruments and curiosities, are not deemed to be included in any insurance, unless specified in the Policy.

10. In any case where the consent of this Company is granted to a transfer of a Policy as collateral security, then, in case of loss or damage by fire to the subject insured, the assured party, and not the mortgagee or assignee, is required to make the requisite proofs of loss in their own name as herein specified, and fully comply with all the conditions and requisitions as herein contained, as much so as if the Policy had never been assigned; otherwise this Policy shall be void, and of no force or effect whatever, and all liability on the part of this Company shall cease.

11. Persons sustaining loss or damage by fire, shall forthwith give notice thereof in writing to the Company or their Agent. And as soon after as possible, they shall deliver a true copy of the written part of their policy, and as particular an account of their loss and damage as the nature of the case will admit, rendering to this Company or their Agent a schedule or list of articles destroyed or damaged, stating item by item, and article by article, together with the actual cash value of each article or item, respectively, at the time of such loss, signed with their own hands; which said account shall set forth the whole cash value of the subject insured; the loss and damage claimed thereon; who are the owners thereof; that at the time of and immediately before the fire, the subject insured was in, upon, or at the place or location specified in the written part of this Policy, and covered thereby, and that the same was either destroyed, damaged, or lost (as the case may be) in consequence of fire. And they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also whether any and what other insurances have been made on the same property; what was the whole cash value of the subject insured, at the time of such loss; what was their interest therein; in what general manner (as to trade manufactory, merchandize or otherwise), the building insured or con-

taining the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building; and when and how the fire originated, so far as they know or believe, or have any information. They shall also produce and leave with the Company or their Agent, a certificate under the hand and seal of a magistrate nearest the place of the fire, and not concerned in the loss, as a creditor or otherwise, or related to the insured or sufferers, stating that he has personally examined the circumstances attending the fire, loss or damage alleged; that he is acquainted with the character and circumstances of the insured or claimant, and that he verily believes that he, she, or they have, by misfortune, and without fraud or evil practice, sustained loss and damage on the subject insured, to the amount which the magistrate, as aforesaid, shall certify. Where merchandize or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting, and arranging the various articles according to their kinds; and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind, and the estimated amount of damage which each article has sustained. The damage shall then be ascertained by the examination and appraisal of each article by two disinterested appraisers, one chosen by the Company and one by the insured, and in case of their disagreement as to the amount of damage upon any article, they shall nominate a third person to act as umpire between them; and the award in writing under the hands of such appraisers, or any two of them, shall be binding and conclusive as to the amount of damage upon both parties to this Policy; and if this Company or their Agent shall require such an examination or appraisement, it shall be so submitted, otherwise this Company will not be liable for any loss or damage under this Policy; and upon the neglect or refusal of the assured to nominate an appraiser and submit thereto, in accordance with the conditions of this article of agreement, then all claim or claims for loss or damage, by virtue of this Policy, to cease and be of no force or effect.

And whenever required in writing, the insured, or person claiming, shall produce and exhibit the books of account, bills of purchase, and other vouchers of the insured, to the insurers or their agent, at the office of this Company, or at the office of such agent, in support of the claim, and leave them with this Company, or their agent, a sufficient length of time to permit extracts and copies thereof to be made. And also exhibit to any person or persons named by this Company, or their agent, and permit to be examined by them, any property damaged on which any loss is claimed. And shall also, if required, submit to an examination under oath, by the agent or attorney of this Company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, and subscribe and make oath to such examination, the same being reduced to writing.

And until such proofs, examinations, declarations, certificates, and exhibitions are produced, and permitted by the claimant, when required as above, the loss shall not be payable.

Any fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against this Company under the within Policy.

12. In case of any loss or damage to the property insured, it shall be optional with the Company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or repair the buildings, within a reasonable time, giving notice of their intention so to do, within thirty days after having received the preliminary proofs of loss required by the eleventh Article of these conditions. And in case any dispute or difference shall arise or occur, touching any loss or damage under this Policy, it may at the election of said Company be referred or submitted to the judgment of two impartial arbitrators, of whom the Company or their said agent shall select one, and the said insured shall select a second, and the said two arbitrators, in case of their disagreement upon the matters so submitted or referred to them, shall nominate a third person to act as umpire between them; and the award in writing, under the hands and seals of such arbitrators, or any two of them, shall be binding and conclusive as to the matters so submitted, upon both parties to this Policy; and in case the said Company or their agent shall require such submission to arbitration, the said difference or dispute shall be so submitted. The expense of ascertaining and proving any loss which may occur, and also of forwarding such proofs to the office of the Company, shall be paid by the party insured.

13. Payment of losses shall be made at the end of four months after the loss shall have been ascertained and proved, and the preliminary proofs furnished, as required by these conditions, and the aforesaid conditions fully complied with.

14. Insurances once made may be continued for such further time as may be agreed on, the premium required therefor being paid and endorsed on the Policy, or a receipt given for the same; and all insurances, original or renewed, shall be considered as made under the original representations, in so far as it may not be varied by new representations, which in all cases it shall be incumbent on the party insured to make, when the risk has been changed, either within itself, or by the surrounding or adjacent buildings.

15. It is furthermore hereby expressly provided, that no suit or action of any kind against this Company, for the recovery of any claim upon, under, or by virtue of this Policy, shall be sustainable in any Court of Law or Equity, unless such suit or action shall be commenced within the term of twelve months next after the cause of action shall have accrued; and in case any such suit or action shall be commenced against said Company, after the expiration of twelve months next after the cause of action shall have accrued, the lapse

of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

16. The Company will not be answerable for any loss arising from the use of fires in buildings unprovided with good substantial stone or brick chimneys, or in consequence of neglect or deviations from the laws or regulations of Police, made to prevent accidents from fire, in places where laws and regulations on this subject exist; or for any damage caused by fire originating from depositing ashes or embers in wooden vessels.

17. In all cases of application for insurance in this Company, the applicant shall state the true value of the property, and also the amount of incumbrance on the same. And should there afterwards, during the life of the policy, an incumbrance fall, or be executed upon the property insured sufficient to reduce the real interest of the insured in the same to a sum only equal to or below the amount insured, and he shall neglect or fail to obtain consent of the Company thereto, then and in that case the policy shall be void.

Any alteration or repairs made in or about the risk, must be made at the risk of the owner or owners.

And afterwards, to wit, on the 19th day of June, 1854, the defendants, by their counsel, came and filed the following affidavit of defence:

Copy of Affidavit of Defence.

Circuit Court of the United States. Western District of Pennsylvania.

STATE MUTUAL FIRE INSURANCE COMPANY, A Corporation of the State of Pennsylvania, *ads.* DANIEL F. CONNELL and JOHN A. CARTER, Citizens of the State of Virginia. } No. 4, of Nov. Term, 1854.

Personally appeared, A. A. Carrier, who being by me duly sworn, did depose and say, that in August or September, 1850, he came to the City of Pittsburgh as the agent of the State Mutual Fire Insurance Company, and that from that time until the present, he has managed, as agent, the affairs of said Company in said city; that the policy, part of which he believes the plaintiffs have filed a true copy, in this cause, was obtained from this affiant by D. F. Connell, one of the plaintiffs, signed by this affiant as agent of said Company, and delivered in that capacity to said Connell; that said Company has, as this affiant verily believes, just and full defence to the whole of the plaintiffs' claim in this action, the nature and character of which defence is stated fully and particularly as follows:

That said Court has not jurisdiction of this cause as against said defendant as the same is set forth in the plaintiffs' writ and declaration under the provisions of the 11th Section of an "Act to esta-

blish the Judicial Courts of the United States," approved September 24th, 1789. That said Court has not jurisdiction, and this action cannot be sustained in said Court by said plaintiffs, upon the facts alleged in the writ and declaration in this cause.

That by the terms of the policy, copy of a part of which has been filed by the plaintiff in this cause, it is expressly provided that the conditions annexed to said policy were made a part of said policy, and were to be used and resorted to in order to explain the rights and obligations of the parties thereto in all cases, not therein otherwise specially provided for. That by the latter clause of article second of the conditions of insurance, which were annexed to the said policy issued to said plaintiffs, and a copy of which conditions and the application is filed with this affidavit (which conditions the plaintiffs have omitted to file in this cause), it was provided,

That, "if the interest in the property to be insured, be a leasehold or other interest not absolute, it must be stated in the policy, otherwise the policy shall be void."

That the interest of the plaintiffs in the property insured in and by said policy, was not, when said policy was issued and delivered to said plaintiffs, nor has it at any time since, been an absolute, nor is such interest stated in the policy to be a leasehold or other interest not absolute, and that by said policy it was declared that said policy was made and accepted in reference to the written application made by said plaintiffs for said insurance; that in answer to the tenth interrogatory contained in said application, inquiring whether said property was incumbered, the plaintiffs replied, "No."

That if said plaintiffs had any interest whatever in said property at the time of the said application and insurance, it was largely incumbered; that said plaintiffs never had, as this affiant has been informed and verily believes, any legal estate in fee in said property or any legal title thereto, and that they never had any equitable title thereto, as he is informed and believes, in virtue of which they could have secured the conveyance to them of an absolute legal title in fee for said premises. That this affiant verily believes that if said plaintiffs had, at the time of said application and insurance, or at the time of the alleged destruction of the premises by fire, any interest whatever in said premises or property, it was of very little value; that this affiant has been informed and believes, that if said plaintiffs had any title whatever to said premises, it was merely equitable, vague, uncertain, contingent, and of very little value.

Affiant further states that he verily believes, that if said plaintiffs have sustained any loss and damage by fire, insured against by said policy, such loss and damage is very small, and but a very small portion of said sum of thirty-five hundred dollars claimed by them. That he does not believe that they had any insurable interest in said property.

This affiant further saith that he would not have issued said policy

to said plaintiffs, had he not supposed and fully believed at the time, the said plaintiffs had a complete legal title to the premises insured, and that the same were wholly unincumbered when the same was insured.

A. A. CARRIER,
Agent.

Sworn to and subscribed before me, this 19th day of June, A. D. 1854.

H. SPROUL,
U. S. Comm'r.

Copy of Application.

Merchants' Class State Mutual Fire Insurance Company, Harrisburgh, Pa. Application of D. F. Connell and John A. Carter, of Wellsville, in the County of Columbiana, State of Ohio, for insurance against loss by fire by the State Mutual Fire Insurance Company, in the sum of thirty-five hundred dollars, commencing the 29th day of Dec., 1852, at noon, for the term of one year, on property specified below.

On their three storied brick building and store rooms, situate on the corner of Lisbon and Water Streets, borough of Wellsville, O.

Estimated value, $3,500. Insurance value, $2,500. Rate per ct., ¾ per cent.

On their two storied brick dwelling, near the store, occupied as a dwelling.

Estimated value, $1,500. Insurance value, $1,000.

Amount of ¾ per cent., $26 25; amount insured, $3,500, policy, &c., cash premium, $26 25; situate in the borough of Wellsville, in the County of Columbiana, State of Ohio.

2. Of what material is the building constructed, height, and size?

3. For what purpose occupied, and by whom?

As above, also for office, O'Reilly Telegraph.

4. How many stores? that is, under them?

How are the stove-pipes, which pass through petitions or floors and into chimneys, secured?

Stove-pipes, ashes, matches, &c., all properly secured and disposed of.

How far from wood?

How are fire-flues not in use secured?

How are your ashes kept at all times?

How are matches kept?

Is camphine used for lighting?

No.

Is the property now insured? If so, what amount, and at what office?

No.

State the distance to other building; of what constructed, and for what purpose used?

Is there any insurance by this Company within 100 feet; if so, for whom, and how much?

No.

How near to the building to be insured, or containing property to be insured, can a building be erected without your consent?

Adj.

Is there a good engine, and well-organized fire company, near the premises?

No organized Co.

And the said applicant hereby agrees to and with the said Company that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property to be insured, so far as the same are known to the applicant, and are material to the risk; and the said applicant further agrees, that if any alterations, in or about the premises described, are made, which materially affects the risk, he will notify the said Company of said alterations.

CONNELL & CARTER,
Applicants.

This application was attached to the affidavit of defence.

State Mutual Fire Insurance Company, corner of Fourth and Market Sts., Harrisburg, Pa.

Officers: A. J. Gillett, Secretary; J. P. Rutherford, President. Directors: John P. Rutherford, Dauphin County; Philo C. Sedgwick, Harrisburg; Albert J. Gillett, Harrisburg; John B. Packer, Sunbury; Samuel T. Jones, Harrisburg; Robert Klotz, Mauch Chunk; Alonzo A. Carrier, Pittsburg; John B. Rutherford, Dauphin County; Samuel Jones, Philadelphia.

Directions for Making an Assignment, and Conditions of Insurance, referred to in the foregoing Policy.

☞ In all cases where the Policy is to be assigned, the assigner must sign the assignment made out on the back of the Policy, and send to the Secretary, or a true copy thereof (with fifty cents recording fees), to be approved by a Director, and recorded on the Policy; also, on the book of the Company.

☞ All communications should be directed to the Secretary (post-paid), and if in reference to the Policy, the number must be given.

1. Applications for insurance on property must be in writing, and specify the construction and material of the buildings to be insured, or containing the property to be insured; by whom occupied, whether as a private dwelling, or how otherwise; its situation with respect to

contiguous buildings, and their construction or materials; whether any manufacturing is carried on within or about it; and in case of goods or merchandise, whether or not they are of the description denominated hazardous or extra hazardous, and such description or specification shall be signed by the applicant, and it shall be deemed a part of the Policy, and a warranty on the part of the insured.

If any person, insuring any building or goods in this Company, shall make any misrepresentations or concealment; or if, after the insurance is effected, either by an original Policy, or by the renewal thereof, the risk shall be increased by any means whatsoever within the control of the insured; or if such buildings or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect.

If, during the insurance, the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises or otherwise; or if, for any other cause the Company shall so elect, it shall be optional with the Company to terminate the insurance, after notice given to the insured, or his representative, of their intention to do so; in which case the Company shall refund a ratable proportion of the premium.

2. Property held in trust, or on commission, must be insured as such, otherwise the Policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Goods on storage must be separately and specifically insured. If the interest in the property to be insured be a leasehold or other interest, not absolute, it must be so stated in the Policy, otherwise the Policy shall be void.

3. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium, or if the premium named in this Policy, or any obligation which may be given for such insurance, or any part of it remains unpaid, or the conditions of such obligation are not fully complied with, this Policy shall be void and of no effect.

4. The interest of the insured in this Policy is assignable, provided the assent of this corporation be first obtained to the transfer; notice of such assignment shall be given before any loss may have happened, and this Company, when so notified, may elect either to continue the insurance, and express the same by endorsement on this Policy, or refund a ratable portion of the premium, for the time of the risk unexpired, and cancel the Policy. In case of assignment without such consent, whether of the whole Policy or of any interest in it, or of any claims against said Company by virtue thereof, either prior or subsequent to loss or damage of the property or premises insured thereby, the liability of this Company, in virtue of such Policy, shall thenceforth cease.

The insurance by this Policy shall cease from the time that the

property hereby insured shall be levied on or taken into possession or custody under an execution, or other proceeding at law or equity.

Or if the property herein insured, or any part of it, shall be transferred by any contract or any change of partnership or ownership, then this Policy shall be void, unless the consent of the Secretary thereto be endorsed on this Policy.

5. Notice of all previous insurance upon property insured by this Company shall be given to the Secretary, and endorsed on this Policy, or otherwise acknowledged by him in writing; otherwise the Policy subscribed by this Company shall be of no effect. And in case of subsequent insurance on property insured by this Company, notice thereof must be immediately given to the Secretary, to the end that such subsequent insurance may be endorsed on the Policy subscribed by this Company, or otherwise acknowledged in writing; in default whereof, such Policy shall thenceforth cease and be of no effect. And in all cases of insurance, this Company shall be liable for such ratable proportion of the loss or damage happening to the subject insured, as the amount insured by this Company shall bear to the whole amount insured thereon, without reference to the dates of the different Policies, subject to the above conditions.

6. In case of fire, or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property. And if they fail to do so, this Company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect. And it is mutually understood and agreed that there can be no abandonment to the insurers of the subject insured; and also that this Company or their agent have the right to examine and take account of the property saved, and that every facility be given to enable them to do so.

7. This Company will be liable for losses on property burnt by lightning; but not for any loss or damage to property injured or destroyed by lightning in any other way; nor for any loss or damage by fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, nor for any loss or damage caused by the bursting or explosion of any steam-boiler or flues of any steam-engine; nor for any loss or damage caused by the bursting or explosion arising from any other cause; nor for any loss or claim for stolen goods, or for any other property that may be stolen, unless specially specified on this Policy; or if the loss shall happen through the gross, wanton, or wilful misconduct of the insured, or through his gross or culpable negligence, or by means of his intoxication.

If no notice of a loss is given within thirty days from the time when it happened, it shall be discretionary with the Directors to reject or allow the claim of any part thereof.

No repairs or alterations in the premises shall be made after a fire

until notice is given to the Company, and they have had an opportunity to view and examine.

8. Books of accounts, written securities, or other evidences of debt, title deeds, writings, money, or bullion, are not deemed subjects of insurance.

9. Jewelry, plate, plated-ware, medals, paintings, statuary, spirituous liquors, sculptures, musical instruments, and curiosities, are not deemed to be included in any insurance, unless specified in the Policy.

10. In any case, where the consent of this Company is granted to a transfer of a Policy as collateral security, then, in case of loss or damage by fire to the subject insured, the assured party, and not the mortgagee or assignee, is required to make the requisite proofs of loss in their own name as herein specified, and fully comply with all the conditions and requisitions as herein contained, as much so as if the Policy had never been assigned; otherwise this Policy shall be void, and of no force or effect whatever, and all liability on the part of this Company shall cease.

11. Persons sustaining loss or damage by fire, shall forthwith give notice thereof in writing to the Company or their agent. And, as soon after as possible, they shall deliver a true copy of the written part of their Policy, and as particular an account of their loss and damage as the nature of the case will admit, rendering to this Company or their agent a schedule or list of articles destroyed or damaged, stating item by item, and article by article, together with the actual cash value of each article or item, respectively, at the time of such loss, signed with their own hands; which said account shall set forth the whole cash value of the subject insured; the loss and damage claimed thereon; who are the owners thereof; that at the time of and immediately before the fire, the subject insured was in, upon, or at the place or location specified in the written part of this Policy, and covered thereby, and that the same was either destroyed, damaged, or lost (as the case may be) in consequence of fire. And they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also whether any and what other insurances have been made on the same property; what was the whole cash value of the subject insured at the time of such loss; what was their interest therein; in what general manner (as to trade, manufactory, merchandise, or otherwise), the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building; and when and how the fire originated, so far as they know or believe, or have any information. They shall also produce and leave with the Company, or their agent, a certificate under the hand and seal of a magistrate nearest the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers, stating that he has personally examined the circumstances

attending the fire, loss, or damage alleged; that he is acquainted with the character and circumstances of the insured or claimant, and that he verily believes that he, she, or they, have, by misfortune, and without fraud or evil practice, sustained loss and damage on the subject insured, to the amount which the magistrate, as aforesaid, shall certify. Where merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds; and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind, and the estimated amount of damage which each article has sustained. The damage shall then be ascertained by the examination and appraisal of each article by two disinterested appraisers, one chosen by the Company and one by the insured, and in case of their disagreement as to the amount of damage upon any article, they shall nominate a third person to act as umpire between them; and the award in writing under the hands of such appraisers, or any two of them, shall be binding and conclusive as to the amount of damage upon both parties to this Policy; and if this Company or their agent shall require such an examination or appraisement, it shall be so submitted, otherwise this Company will not be liable for any loss or damage under this Policy, and upon the neglect or refusal of the assured to nominate an appraiser and submit thereto, in accordance with the conditions of this article of agreement, then all claim or claims for loss or damage, by virtue of this Policy, to cease and be of no force and effect.

And whenever required in writing, the insured, or person claiming, shall produce and exhibit the books of account, bills of purchase, and other vouchers of the insured, to the insurers or their agent, at the office of this Company, or at the office of such agent, in support of the claim, and leave them with this Company, or their agent, a sufficient length of time to permit extracts and copies thereof to be made. And also exhibit to any person or persons named by this Company, or their agent, and permit to be examined by them, any property damaged on which any loss is claimed. And shall also, if required, submit to an examination under oath, by the agent or attorney of this Company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, and subscribe and make oath to such examination, the same being reduced to writing. And until such proofs, examinations, declarations, certificates, and exhibitions are produced, and permitted by the claimant, when required as above, the loss shall not be payable.

Any fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against this Company under the within Policy.

12. In case of any loss or damage to the property insured, it shall be optional with the Company to replace the articles lost or damaged

with others of the same kind and equal goodness, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention so to do, within thirty days after having received the preliminary proofs of loss required by the eleventh Article of these conditions. And in case any dispute or difference shall arise or occur, touching any loss or damage under this Policy, it may at the election of said Company be referred or submitted to the judgment of two impartial arbitrators, of whom the Company or their said agent shall select one, and the said insured shall select a second, and the said two arbitrators, in case of their disagreement upon the matters so submitted or referred to them, shall nominate a third person to act as umpire between them; and the award in writing, under the hands and seals of such arbitrators, or any two of them, shall be binding and conclusive as to the matters so submitted, upon both parties to this Policy; and in case the said Company or their agent shall require such submission to arbitration, the said difference or dispute shall be so submitted. The expense of ascertaining and proving any loss which may occur, and also of forwarding such proofs to the office of the Company, shall be paid by the party insured.

13. Payment of losses shall be made at the end of four months after the loss shall have been ascertained and proved, and the preliminary proofs furnished, as required by these conditions, and the aforesaid conditions fully complied with.

14. Insurances once made may be continued for such further time as may be agreed on, the premium required therefor being paid and endorsed on the Policy, or a receipt given for the same; and all insurances, original or renewed, shall be considered as made under the original representations, in so far as it may not be varied by new representations, which, in all cases, it shall be incumbent on the party insured to make, when the risk has been changed, either within itself, or by the surrounding or adjacent buildings.

15. It is furthermore hereby expressly provided, that no suit or action of any kind against this Company, for the recovery of any claim upon, under, or by virtue of this Policy, shall be sustainable in any Court of Law or Equity, unless such suit or action shall be commenced within the term of twelve months next after the cause of action shall have accrued; and in case any such suit or action shall be commenced against said Company, after the expiration of twelve months next after the cause of action shall have accrued, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

16. The Company will not be answerable for any loss arising from the use of fires in buildings unprovided with good and substantial stone or brick chimneys, or in consequence of neglect or deviations from the laws or regulations of police, made to prevent accidents from fire, in places where laws and regulations on this subject exist; or for

any damage caused by fire originating from depositing ashes or embers in wooden vessels.

17. In all cases of application for insurance in this Company, the applicant shall state the true value of the property, and also the amount of incumbrance on the same. And should there afterwards, during the life of the policy, an incumbrance fall, or be executed upon the property insured, sufficient to reduce the REAL interest of the insured in the same to a sum only equal to or below the amount insured, and he shall neglect or fail to obtain the consent of the Company thereto, then and in that case the Policy shall be void.

Any alteration or repairs made in or about the risk, must be made at the risk of the owner or owners.

And afterwards, to wit, on the 23d day of August, 1854, comes the defendants, by their counsel, and files the following pleas:

Copy of Pleas.

Circuit Court of the United States Western District of Pennsylvania.

The STATE MUTUAL FIRE INSURANCE Company, a Corporation of the State of Pennsylvania, defendants, *ads.* DANIEL F. CONNELL and JOHN A. CARTER, citizens of the State of Virginia, plaintiffs. } No. 4. Novr. Term, 1854.

And the said State Mutual Fire Insurance Company, defendants, by A. W. Loomis, its attorney, comes and defends the wrong and injury, when, &c., and saith that it did not undertake or promise, in manner and form, as the said Daniel F. Connell and John A. Carter, plaintiffs, have above thereof complained against it, and of this it puts itself upon the country, &c.

A. W. LOOMIS,
Deft's Atty.

And the said defendant, for a further in that behalf, saith, that said plaintiffs ought not to have or maintain their action thereof against said defendant, because said defendant saith that the interest of the said plaintiffs in the said property insured in and by the policy in said plaintiffs' declaration mentioned, was not at the time the same was insured in and by said policy, an absolute interest, and it was not stated in said policy that said interest was leasehold, or other interest not absolute, and this defendant is ready to verify, wherefore said defendant prays judgment, &c.

A. W. LOOMIS,
Deft. Atty.

And the said defendant, for a further plea on that behalf, saith, that said plaintiffs ought not to have or maintain their aforesaid action thereof against said defendant, because said defendant saith, that

by the terms of said policy, it was declared that said policy was made and accepted in reference to the written application made by said plaintiffs for said insurance, that in answer to the tenth interrogatory, contained in said application, inquiring whether said property, so insured, as stated in said policy, was incumbered, the said plaintiffs replied, that it was not, when in truth and in fact, if said plaintiffs had any interest whatever in said property, at the time of said application and insurance, it was largely incumbered, and this said defendant is ready to verify, &c.

A. W. LOOMIS,
Deft. Atty.

And afterwards, the plaintiff, by their att'y, Geo. S. Selden, comes and files the following replication:

Copy of Replication.

CONNELL and CARTER
v.
INSURANCE CO. } No. 4. Nov. Term, 1854.

And the said plaintiffs, as to the said pleas of defendant, by it fourthly and fifthly above thereof pleaded, saith, that the said plaintiffs, by reason of anything by the said defendant in those pleas alleged, ought not to be barred from having and maintaining their aforesaid action thereof against the said defendant, because he saith, that the facts set forth in said pleas are not true, and of this the said plaintiffs pray may be inquired of by the country, &c.

GEO. S. SELDEN,
Plffs. Atty.

And now, to wit, May 16th, 1855, the parties in this cause being at issue, a jury being called, came, viz., Samuel Spencer, Robert Given, M. W. M'Guire, Joseph Wise, Wm. C. Fishburn, W. T. E. Webb, Benjamin Ross, Madison Kinkead, Wm. S. Gowin, George Morrison, John Gould, and Alexander Purviance, twelve good and lawful men, who having been duly summoned, returned, balloted for, empannelled, and sworn to speak, and the truth to say, did on the 17th day of May, 1855, return the following verdict in writing:

Copy of Verdict.

CONNELL and CARTER
v.
INSURANCE CO. } Circuit Court, U. S.

In this case the jury find for plaintiffs the sum of three thousand seven hundred fifty-two dollars fifty-nine cents. $3752 59.

1855, May 22d. Judgment on the verdict for plaintiff for three thousand seven hundred fifty-two dollars fifty-nine cents, and costs.

1855, May 17th. Before the Court charged the jury in this cause, the counsel of the defendants requested the Court to instruct the jury as follows, viz.:

Copy of Points.

Circuit Court of the United States Western District of Pennsylvania.

STATE MUTUAL FIRE INSURANCE COMPANY, a Corporation of the State of Pennsylvania, *ads.* DANIEL F. CONNELL and JOHN A. CARTER, citizens of the State of Virginia. } No. 4 of Nov. Term, 1854.

The defendants counsel pray the Court to instruct the jury:

I. That if they find from the evidence, that the interest of the said pl'ffs in the property insured in and by the policy, in the pl'ffs declaration mentioned, was not at the time the said property was insured in and by said policy, an absolute interest, then the said policy is void, and the said pl'ffs are not entitled to recover in this action.

II. That the uncontradicted evidence in the case, shows that the interest of the said pl'ffs in said property insured as aforesaid, was not at the time the same was insured, as aforesaid, an absolute interest.

III. That if the jury find from the evidence, that a written application was made by said plaintiffs for said insurance, and that in answer to an interrogatory contained in said application, inquiring whether said property was incumbered, the said plaintiff replied it was not, when in truth and in fact it was largely incumbered, then the said pl'ffs are not entitled to recover in this action.

IV. That if they find from the evidence, that a full disclosure of the actual title of the insured in the premises, as it existed at the time when application was made by said pl'ffs for the insurance, and when said policy was executed, to wit, on the 29th Dec'r, 1852, was material to and would have considerably increased the estimate and value of the risk and premium, and that no other disclosure was made than as aforesaid, to wit, in said application for insurance, then there was a material concealment, which avoids the policy.

Copy of Charge of the Court.

DANIEL F. CONNELL and JOHN A. CARTER, *v.* THE STATE MUTUAL FIRE INSURANCE COMPANY.

The plaintiffs' demand is founded on a policy of insurance against fire on a certain three story brick building, occupied for offices and

stores in the town of Wellsville, Ohio, and also on a brick dwelling-house adjoining. It is for one year from the 29th Dec'r, 1852, to 29 December, 1853.

The premium paid was $26 25. The amount insured in all $3500.

The name of the corporation would suggest that it was what is called a Mutual Insurance Company; the contract in this case is not of that nature, which constitutes the assured a member of the corporation.

The execution of the policy or contract of insurance is admitted, and also that the property insured has been destroyed by fire within the term stated in the policy. It is admitted also that the proper preliminary proof made to enable the plaintiffs to support this action.

Under the plea of the general issue, which is a general denial of all the allegations in the declaration, the defendants contend that this policy is void for concealment and misrepresentation, by the plaintiffs, of facts materially affecting the risk.

The misrepresentation or concealment complained of, has reference to the interest of the plaintiffs in the property and the incumbrances on it.

It is necessary to the validity of a contract of insurance, that the assured should have an *interest* in the property lost at the time of insurance and the time of the loss, otherwise it will be a mere gaming policy, void at law.

But it is not necessary he should be the owner of the legal estate in fee. Thus a mortgagor who has the legal estate may insure, and so may a mortgagee lessee; a man may have an insurable interest in property without either legal or equitable title to the property insured. The term *interest* does not necessarily imply *property*.

It is not contended that the plaintiffs had no insurable interest in the property. They were in possession claiming the property as purchasers, some portion of the purchase-money was unpaid, and they had not received the legal title. Their interest insured, and the amount of their loss is proved to be more than double the sum insured.

But the defence hinges on one of the almost innumerable conditions annexed to the policy in these words: "If *the interest to the property* to be *insured* be a leasehold or other interest *not absolute*, it must be stated in the policy, otherwise the policy will be void." It is contended also, that the plaintiff has represented his interest as not incumbered, when in fact it was largely incumbered. As the four several matters of instruction prayed by the defendants' counsel, fully embody the defence set up, it will be most convenient to state our instructions to you by way of answer to these several points, and in doing so we shall take the first two together, and in like manner the last two, to avoid repetition, and to place the question more clearly before the jury.

The first two are as follows (prout):

Their prayer for instructions are both founded on the conditions annexed to the policy, which we have just mentioned.

As an abstract proposition the first is undoubtedly correct, if the jury believe the hypothesis on which it is founded. But we cannot instruct you as requested in the second.

What is an *absolute* interest within the meaning of this contract, is a question of law for the decision of the Court.

The term absolute, as here used, is very indefinite and equivocal. In seeking for its meaning we must look to the nature of the contract, and the connection in which it stands.

A contract of insurance in order to its validity, does not require that the assured should have a legal and not an equitable title, but only that the assured should have such an interest in the property insured, that he will suffer loss by its destruction; and provided he has such an interest in possession and enjoyment at the time of the insurance and loss, he has a right to insure, and when he has paid the insurance, it is of no importance to the insurer what is the nature of his title; whether it be equitable or legal, it does not affect the risk assumed by the defendants. "An insurance of building against fire, although in popular language it may be called an insurance of the estate, is in effect a contract of indemnity with an owner or *other person*, having an interest in the preservation of the buildings." Wilson *v.* Hill, 3 Metcalf, 66. Accordingly, this instrument does not require any of the title of the assured to the property, or that he should state the nature of his title. It requires only that he state whether his interest be merely temporary or a leasehold or other *interest* not *absolute*.

The term "*absolute*" strictly is opposed to conditional or contingent. But it is used by legal writers as opposed to limited or qualified interest (see Angel on Insurance, § 56); here it is used in opposition to the word leasehold, which is a temporary or limited interest.

The interest of the plaintiff in this property is neither a leasehold, a temporary, or a qualified interest; the plaintiffs claim the ownership in fee, and whether the title be legal or equitable, it is an absolute interest, not conditional, not in expectancy, not as tenant at will or for years, not as leasehold or limited interest nor qualified property, such as a bailee or a lienholder.

For these reasons, the second instruction requested by defendant is denied.

II. The third and fourth points are as follows (prout):

The fourth and last of these propositions, taken by itself as a general and abstract of the law, is undoubtedly correct. But even assuming the hypothesis of these as correct, the inference of law does not necessarily follow.

In considering this question, we must bear in mind that the defen-

dants are a "*Mutual Insurance Company*," and, although, as in the present case, they take risks not on the mutual principle, the subjects of representation and their interrogatories and conditions, are drawn with a view to the information required in both instances; a representation in one case might be very material to the risk which might be wholly immaterial to it in the other. On the mutual principle, the assured is himself an insurer for all his partners. He does not pay a round sum to be insured for a year, but gives his note for a certain sum which becomes the capital to pay losses, and which is called for only when needed to pay losses. Hence it is of the highest importance that each partner or member of the Company be a solvent man; and the question becomes material (even if the note be not a lien on his property), that his estate should not be largely incumbered. If A and B have each houses worth $10,000, and agreed to insure one another, the contract would have no reciprocity if one was worth $10,000, and the other unable to pay his debts. The property of one clear and unincumbered, and that of the other covered with judgments for more than it was worth. But A pays B a sum of money to indemnify him against loss by fire for a year, what difference does it make to A whether B is rich or poor, solvent or insolvent, whether his house is incumbered with judgments or not? It adds nothing to the risk. The insurer has no right to say you have lost nothing, for if your house had not been burnt your creditors would have taken it.

The tenth interrogatory may be very material in a case of Mutual Insurance. But in case of a contract of indemnity for a given time, when the insurer is paid, is it all material to the risk whether the title to the property was free of all incumbrance or not? This is a question for the jury.

If it be true that the plaintiffs lost more than double the insurance on these houses; that they had an equitable title which, by payment of a sum inconsiderable in comparison with the whole value of the property, can be converted into a legal estate in fee simple. It will be for the jury to say whether a neglect to state the nature of their title, was the suppression of a fact materially affecting the risk; as it is admitted that the interest of the plaintiffs is an insurable one, it is for the jury to say whether there was any incumbrances upon that interest or estate as held by them.

If they find that the interest or estate of the plaintiffs in the premises was incumbered; that this fact was concealed; that it was material to the risk, so that if known to the defendants they would not have executed this policy, then their verdict should be for defendants on this issue. And they will assess the damages, the sum insured with interest.

If the jury find the facts stated in the two special pleas to be true, they will find them for defendant.

Whereupon the counsel for the defendants except to the ruling

and charge of the Court, and files the following Bill of Exceptions, which is signed and sealed by the Court, and a writ of error allowed on giving the usual security.

Copy of Bill of Exceptions.

In the Circuit Court of the United States, for the Western District of Penn.

DANIEL F. CONNELL and JOHN A. CARTER, Citizens of the State of Virginia, *v.* THE STATE MUTUAL INSURANCE COMPANY, Harrisburgh, Pa., a Corporation of the State of Pennsylvania.

No. 4, November Term, 1854. Action Trespass on the Case.

Be it remembered, that at the May Term, A. D. 1855, of the said Court, before the Honorable R. C. Grier, an Associate Justice of the Supreme Court of the United States, and the Honorable Thomas Irwin, Judge of the said District Court, Judges holding said Court at Pittsburgh, in said District, the parties in this cause were at issue upon the plea of non assumpsit, and divers special affirmative pleas and replication, traversing the facts in said special pleas alleged, as appears on record in the cause.

And thereupon a jury was called and regularly and legally empanelled and sworn to try the said issues. And on the trial thereof, the plaintiffs, to prove the same on their part, gave in evidence a Policy of Insurance executed by said Insurance Company, and conditions thereto attached, a copy of which policy and conditions was attached to and filed with said declaration, and is of record in the cause.

It was admitted by the defendant that the requisite preliminary proofs had been made by the plaintiffs, and that said buildings, insured as aforesaid, had been destroyed by fire within the life of said policy.

The plaintiffs further gave evidence by one witness to prove that the buildings insured were worth at the time of their destruction by fire, six or seven thousand dollars; and by another witness, seven or eight thousand dollars.

On the other hand, the defendant gave in evidence an admission in writing by the parties, that on the 14th day of October, 1848, one Henry Atew, was the owner and holder of the legal title to the lots and premises on which the buildings insured were erected; that, being such owner and holder he, on the day and year last aforesaid, entered into a written contract for the conveyance of said lots and premises for the consideration of five thousand dollars, upon certain conditions, to James S. Connell and N. U. Walker, who paid the said Atew, in the year 1849, one thousand dollars on said contract

for a conveyance. That said Connell and Walker subsequently conveyed their equitable interest in said premises to said plaintiffs, who were by their tenants in possession of said buildings insured in and by said policy, under their equitable title aforesaid, thereto at the time of the execution of said policy, and at the time of the destruction of said buildings by fire within the life of said policy, the legal title to said lots still remaining in said Henry Atew, subject to the rights and claims of the plaintiffs, under the state of facts before mentioned.

The defendant further gave in evidence, the application mentioned in the policy aforesaid, and pleading, and evidence to prove that the same was executed by the plaintiff Connell, in the name of Connell and Carter; that said Connell answered the interrogatories as they were stated; that in answer to the tenth interrogatory, contained in said application, inquiring whether the said property so insured, as stated in said policy, was encumbered, the said plaintiff replied it was not. And further, gave evidence to prove by the agent of the defendant, that had he known at the time the property was insured, as aforesaid, that the plaintiffs had a more equitable title, he would *he would* as such agent, have charged a much higher rate of premium for such insurance than was charged, if he had taken the risk at all; and the defendant claiming that the plaintiffs were not entitled to recover, that the interest of the plaintiffs in the property insured, was not an absolute interest, and it was not stated in said policy that said interest was leasehold or other interest; and also, that said plaintiffs were not entitled to recover for the reason that the answer to said tenth interrogatory, in said application, the said plaintiff had answered that said property was not encumbered, when in truth, it was largely encumbered, and that the said plaintiff had been guilty of misrepresentation and concealment, that defeated their right to a recovery: and thereupon, the defendant's counsel prayed the Court to instruct the jury as follows:

I. That if they find from the evidence, that the interest of the plaintiffs in the property insured in and by said policy in the plaintiffs' declaration mentioned, was not, at the time the said property was insured, in and by said policy, an absolute interest, then the said policy is void, and the said plaintiffs are not entitled to recover in this action.

II. That the uncontradicted evidence in the cause shows, that the interest of the said plaintiffs in said property insured as aforesaid, was not at the time the same was so insured as aforesaid, an absolute interest.

III. That if the jury find from the evidence, that a written application was made by said plaintiffs, for said insurance, and that in answer to an interrogatory contained in said application, inquiring whether said property was encumbered, the plaintiffs replied it was not, when in truth and in fact it was largely encumbered, then the said plaintiffs are not entitled to recover in this action:

IV. That if they find from the evidence, that a full disclosure of the actual title of the insured in the premises, as it existed at the time when application was made by said plaintiffs for the insurance, and when said policy was executed, to wit, on the 29th day of December, 1852, was material to, and would have considerably increased the estimate and value of the risk and premium, and that no other disclosure was made than as aforesaid, to wit, in said application for insurance; then there was a material concealment which avoids the policy.

And thereupon the Court instructed the jury, and ruled the defendants said prayers for instructions, as follows, to wit:

The plaintiffs' demand is founded on a policy of insurance against fire, on a certain three story brick building, occupied for offices and stores, in the town of Wellsville, Ohio, and also on a brick dwelling-house adjoining it, is for one year, from 29th December, 1852, to 29th December, 1853. The premium paid was $26 25, the amount insured in all, $3500. The name of the corporation would suggest that it was what is called a mutual insurance Co. The contract in this case is not of that nature which constitutes the assured a member of the corporation.

The execution of the policy or contract of insurance is admitted, and also that the property insured has been destroyed by fire within the term stated in the policy.

It is admitted also, that the proper preliminary proof was made to enable the plaintiffs to support this action.

Under the plea of the general issue, which is a general denial of all the allegations in the declaration, the defendants contend that the policy is void for concealment and misrepresentation by the plff's of facts material to and affecting the risk.

The misrepresentation or concealment complained of, has reference to the interest of the plaintiffs in the property, and the incumbrance on it.

It is necessary to the validity of a contract for insurance, that the assured should have an interest in the property lost at the time of insurance, and the time of the loss, otherwise it will be a mere gaming policy, void at law.

But it is not necessary should be the owner of the legal estate in fee. Thus a mortgagor, who has the legal estate may insure, and so may a mortgagee lessee. A man may have an insurable interest in property without either legal or equitable title to the property insured. The term interest, does not necessarily imply property.

It is not contended that the plaintiffs had no insurable interest in the property; they were in possession claiming the property as purchasers; some portion of the purchase-money was unpaid, and they had not received the legal title. Their interest insured, and the amount of their loss, is proved to be more than double the sum insured. But the defence hinges on one of the almost innumerable

conditions annexed to the policy in these words, "If the interest to the property to be insured, be a leasehold or other interest not absolute, it must be stated in the policy, otherwise the policy will be void." It is contended also, that the plaintiffs has represented his interest as not encumbered, when in fact it was largely encumbered.

As the four several matters of instruction prayed for by the defendants' counsel, fully embody the defence set up, it will be most convenient to state our instructions to you by way of answer to the several points, and in doing so, we shall take the first two together, and in like manner the last two, to avoid repetition, and to place the questions more clearly before the jury.

The first two are as follows (prout):

These prayers for instructions, are both founded on the condition annexed to the policy which we have just mentioned.

As an abstract proposition, the first is undoubtedly correct, if the jury believe the hypothesis on which it is founded. But we cannot instruct you as suggested in the second.

What is an absolute interest within the meaning of the contract, is a question of law for the decision of the Court.

The term absolute as here used, is very indefinite and general. In seeking its meaning, we must look to the nature of the contract, and the connection in which it stands.

A contract of insurance, in order to its validity, does not require that the assured should have a legal and not an equitable title, but only that the assured should have such an interest in the property insured, that he will suffer loss by its destruction; and provided that he has such an interest in possession and enjoyment at the time of the insurance and loss, he has a right to insure, and when he has paid the insurance, it is of no importance to the insurer, what is the nature of his title, whether it be equitable or legal, it does not affect the risk assumed by the defendants. "An insurance of buildings against fire, although in a popular language, it may be called an insurance of the estate, is in effect, a contract of indemnity with an owner or other person having an interest in the preservation of the buildings." Wilson v. Heller, 3 Metcalf, 66.

Accordingly this instrument does not require any deraynment of the title of the assured to the property, or that he should state the nature of his title. It requires only that he state whether his interest be merely temporary or leasehold, or other interest not absolute.

The term "absolute" strictly is opposed to conditional or contingent, but it is used by legal writers as opposed to a "limited" or qualified interest (see Angel on Insurance, § 56); here it is used in opposition to the word leasehold, which is a temporary or limited interest.

The interest of the plaintiff in this property, is neither leasehold or temporary, or a qualified interest. The plaintiff claims the ownership in fee, and whether the title be legal or equitable, it is an abso-

lute interest; not conditional nor in expectancy; not as tenant at will, or for years; not as a leasehold or limited interest, nor qualified property, such as bailee or lien holder.

For these reasons, the second instruction requested by defendant is denied.

The third and fourth points are as follows (prout):

The fourth and last of these propositions, taken by itself as a general and abstract statement of the law, is undoubtedly correct. But even assuming the hypothesis of the third as correct; the inference of law does not necessarily follow.

In considering this question, we must bear in mind that the defendants are a "Mutual Insurance Company," and although as in the present case, they take risks not on the mutual principle, the subject of representation, and their interrogatories and conditions are drawn with a view to the information required in both instances; a representation in one case might be very material to the risk, which might be wholly immaterial to it in the other. On the mutual principle, the assured is himself an insurer for all his partners. He does not pay the round sum to be insured for a year, but gives his note for a certain sum which becomes the capital to pay the losses, and which is called for only when needed to pay losses. Hence it is of the highest importance, that each partner or member of the Company be a solvent man, and the question becomes material (even if the note not a lien on his property), that his estate should be largely encumbered. If A and B have each houses worth $1000, and agree to insure one another, the contract, would have no reciprocity, if one was worth $10,000, and the other not able to pay his debts; the property of the one clear and unencumbered, and that of the other covered with judgments for more than it was worth.

But "A pays B a sum of money to indemnify him against loss by fire for a year, what difference does it make to A whether B is rich or poor, solvent, or insolvent, whether his house be encumbered with judgments or not? It adds nothing to the risk. The insurer has no right to say, You have lost nothing, for if your house had not been burnt, your creditors would have taken it."

The tenth interrogatory may be very material in a case of mutual insurance, but in case of a contract of indemnity for a given term, when the insurance is paid, is it all material to the risk, whether the title to the property was free of all encumbrances or not? This is a question for the jury. If it be true that the plaintiff lost more than double the insurance on the house, that they had an equitable title, which by payment of a sum inconsiderable in comparison with the whole value of the property, can be converted into a legal estate in fee simple, it will be for you to say, whether a neglect to state the nature of their title, was the suppression of a fact materially affecting the risk, as it is admitted, that the interest of the plaintiffs is an

insurable one; it is for the jury to say whether there is any encumbrance upon that interest or estate, as held by them.

If they find that the interest or estate of the plaintiffs in the premises was encumbered; that this fact was concealed, that was material to the risk, so that if known to the defendants, they would not have executed this policy, then their verdict should be for the defendants on this issue, and they will assess the damages, the sum insured and interest.

If the jury find the facts stated in the two special pleas to be true, they will find them for the defendants.

And the said defendant, here in Court, during the trial of said cause, and before the jury retired from the bar to consider of their verdict, except to the ruling by said Court, of said defendants, said prayers for instructions as aforesaid, and as the facts aforesaid do not appear of record, the said defendants pray that this bill of exceptions may be certified, signed, and sealed by the Judges or a Judge of said Court, and that the same may become part and parcel of the record in said cause.

By the Court allowed, and ordered to be placed on the files.

TH. IRWIN, [SEAL.]
District Judge.

United States of America, *ss.*

[SEAL.] The President of the United States: To the Judges of the Circuit Court of the United States, for the Western District of Pennsylvania.

Because in the record and proceedings, as also in the rendition of the judgment of a plea which in the said Court before you, between Daniel F. Connell and John A. Carter, citizens of the State of Virginia, plaintiffs, and the State Mutual Fire Insurance Company, a Corporation of the State of Pennsylvania, defendants, a manifest error hath happened, to the great damage of the said defendants, as appears by their complaint.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may correct that error, and do what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Roger B. Taney, Esquire, Chief Justice of the Supreme Court of the United States, at Pittsburgh, the 31st day of

May, A. D. 1855, and of the Independence of the United States the seventy-ninth.

H. SPROUL,
Clerk.

I, Thomas Irwin, one of the Judges of the Circuit Court of the United States, in and for the Western District of Pennsylvania, in the Third Circuit, having taken and approved the bond of A. J. Gillell, Lucius Morton, and Silas Ward, as sureties of the defendants, do allow this writ of error.

Witness my hand and seal, this 1st day of June, A. D. 1855.

[SEAL.] TH. IRWIN.

(Endorsed): Connell and Carter *v.* The State Mutual Ins. Company; A Copy of Writ of Error, retained in the Office; Filed 31st May, 1855.

United States of America. Western District of Pennsylvania, *sct.*

The President of the United States: To the Marshal of the Western District of Pennsylvania. Greeting.

Whereas, the State Mutual Fire Insurance Company, a Corporation of the State of Pennsylvania, have this day sued out their writ of error to a certain judgment, in a certain action on the case, recovered against them on the 22d day of May, A. D. 1855, in the Circuit Court of the United States, in and fo the Western District of Penn., in the Third Circuit aforesaid, by Daniel F. Connell and John A. Carter, citizens of the State of Virginia, plaintiffs in said action. Returnable to the Supreme Court of the United States on the first Monday of December next.

These are, therefore, to command you, that you make known to the said Daniel F. Connell and John A. Carter, that they be and appear to the said Writ of Error in the said Supreme Court, on the first day of the next term, thereof to hear an assignment of error thereof, and herein fail not at your peril.

And how you shall have executed this Writ of Citation, make return to our clerk of our said Court for the Western District of Pennsylvania, at Pittsburgh, on the rule day of said Court, for the month of July next.

Witness the Hon. Thomas Irwin, one of the Judges of the Circuit Court, United States, for the Western Dist. of Penn., at Pittsburgh, the 1st day of June, 1855.

[SEAL.] TH. IRWIN.

(Endorsed): No. 4, of Nov. Term, 1854; Connell and Carter *v.* The State Mutual Fire Insurance Company; Citation; Service accepted, June 13, 1855, Geo. S. Selden, Att'y for pl'ff; Served

the within citation by copy, and service accepted as above, June 13th, 1855, Westley Frost, Marshal; Service, $2 50; Geo. S. Selden.

United States of America. Western District of Penn., *sct.*

I, Henry Sproul, Clerk of the Circuit Court of the United States for the Western District of Pennsylvania, do hereby certify, that the foregoing is a true exemplification of the record and proceedings in the foregoing cause, together with the original Writ of Error and Citation, copies of which have been retained in this office.

[SEAL.]

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, this 9th day of July, in the year of our Lord one thousand eight hundred and fifty-five, and of the Independence of the United States the eightieth.

H. SPROUL,
Clerk.

Assignment of Errors.

The circuit court of the United States for the western district of Pennsylvania erred on the trial of the cause in that court, as follows, to wit:

1st. In the answer given by said court to the defendants' first prayer for instruction.

2d. In the refusal of said court to give to the jury the instruction prayed for in said first prayer for instruction.

3rd. In the answer given by said court to the defendants' second prayer for instruction.

4th. In the refusal of said court to give to the jury the instruction prayed for in said second prayer for instruction.

5th. In the answer given by said court to the defendants' third prayer for instruction.

6th. In the refusal of said court to give to the jury the instruction prayed for in said third prayer for instruction.

7th. In the answer given by said court to the defendants' fourth prayer for instruction.

A. W. LOOMIS,
Attorney for plaintiff in error.